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No. 89-1433 and No. 89-1434

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

UNITED STATES OF AMERICA,
Appellant
v.
SHAWN D. EICHMAN, *et al.*,
Appellees

UNITED STATES OF AMERICA,
Appellant
v.
MARK JOHN HAGGERTY, *et al.*,
Appellees

On Appeals from the United States District Courts for the District of Columbia and the Western District of Washington

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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With consent of the parties, the American Bar Association (the "Association") respectfully submits this brief as *amicus curiae* in support of the decisions of the two district courts below.

INTEREST OF AMICUS CURIAE

The First Amendment issues involved in these two joined cases have long been of interest to the Association.

Fifty years ago, briefs as *amicus curiae* were filed on behalf of the Association by its Special Committee on the Bill of Rights in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), and later in *Board of Education v. Barnette*, 319 U.S. 624 (1943). In both instances, the Association took the position upheld by the Court in *Barnette* in its overruling of *Gobitis*.

More recently, at its annual meeting in August 1989, the Association's House of Delegates adopted three resolutions presented by its Task Force on the First Amendment, which had been appointed to investigate and evaluate the various proposals designed to overcome or avoid, either by constitutional amendment or federal legislation, the holding of this Court last Term in *Texas v. Johnson*, —— U.S. ——, 109 S. Ct. 2533 (1989).[1] The Association resolved that it

(1) opposed, in the interest of the right to freedom of speech and expression under the First Amendment, the adoption of a constitutional amendment authorizing criminalization of desecration of the American flag as a political protest;

(2) opposed, both on the merits and because of doubtful constitutionality, federal legislation that would seek to criminalize the desecration of the American flag as a political protest; and

(3) deplored any desecration of the flag and declared its full support for the proposition that the flag is a revered national symbol that ought to be treated with great respect by all citizens of the United States.[2]

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[1] The resolutions are included in the Appendix hereto.

[2] The resolutions were submitted to the Congress by the Chair of the House of Delegates by letter of August 21, 1989 from George E. Bushnell, Jr. to Rep. Don Edwards. *See* Appendix. *See also Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 393-94 (1989).

The interest of the Association in filing this brief as *amicus curiae* is the preservation of First Amendment rights of political dissenters.[3] As members of the legal profession, we have a special interest in protecting individual rights and liberties under the First Amendment and the maintenance of principles which often run counter to majoritarian views. We also have a special obligation to ensure that statutes which limit such rights are scrutinized carefully, and pursuant to established constitutional principles, notwithstanding the popular support for such enactments.

THE ASSOCIATION'S POSITION

The United States flag is a symbol of sovereignty, as is typical of all national flags. What is unique to our flag is its symbolism to many throughout the world of the freedoms guaranteed by the Bill of Rights. Sovereignty and freedom of speech are compatible. Reason and experience demonstrate that the inevitable consequence of enforcement of the Flag Protection Act of 1989 will be the prosecution of those, like the appellees in the present cases, who use the flag in offensive ways to express political dissent. The First Amendment right of free speech and expression is at issue. Principles declared by the Court in cases from *Board of Education v. Barnette*, 319 U.S. 624 (1943), to *Texas v. Johnson*, —— U.S. ——, 109 S. Ct. 2533 (1989), control the result here. Since flag burning is a familiar form of political dissent everywhere, the Court's decision will have

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[3] The Association is also interested in showing that its present position on punishment for flag abuse is reflected by the recent action of its House of Delegates in 1989 in adopting the resolutions of its Task Force on the First Amendment rather than by its approval in 1918 of a "Uniform Law for the Protection of the Flag of the United States," reported in the Senate Brief at 15. *See infra* note 27. The Association's later action did not refer to the earlier position but was clearly an implicit rejection of it.

worldwide importance for both friends of democracy and supporters of dictatorship.

ARGUMENT

The American flag is a complex symbol. It represents the state's legitimate power and authority derived from the people, as well as the inalienable right of the people to remain free from the arbitrary exercise and imposition of such delegated power and authority. This dual symbolism is reciprocal and self-reinforcing. Accordingly, the flag's value as a symbol of power and authority cannot be protected at the expense of its value as a symbol of freedom.

When applied to punish those who damage an American flag as a peaceful expression of political dissent, the Flag Protection Act of 1989 violates the constitutional prohibition against laws abridging the freedom of speech.[4] Congress drafted the statute to appear "content neutral" in the hope that such an appearance of neutrality would insulate the law from successful constitutional challenge, but reason and experience, confirmed by legislative history, demonstrate that Congress' sole interest was to protect the symbolic meaning of the flag—clearly a speech-related interest under *United States v. O'Brien*, 391 U.S. 367 (1968)—and that in actual application the law would, as in these cases, criminalize conduct that conveys some message challenging the majority's view of the values represented by the flag.

Nothing in this Court's prior decisions requires it to ignore the speech-related interests underlying this statute, its inevitable effect, and its purpose. Indeed, prece-

[4] One of the two cases before the Court, *United States v. Haggerty*, No. 89-1434, involved the burning of a publicly-owned flag, but the separate count charging the defendants with "willfully injuring property of the United States" is not before the Court on this appeal. We are not here seeking to defend the destruction of a flag belonging to the United States or to any other person.

dent dictates that a statute such as the Flag Protection Act of 1989, which was designed to serve, and will serve, little purpose other than to protect a particular symbolic meaning attributed to the flag and to punish expressive conduct that challenges such meaning, is subject to the strictest scrutiny and must fail under the First Amendment.

I. THE SYMBOLISM OF THE UNITED STATES FLAG IS NOT THREATENED BY PROTECTING EXPRESSIVE CONDUCT THAT PHYSICALLY ABUSES THE FLAG.

Both courts below and all parties here recognize the symbolism of the United States flag.[5] As a symbol of United States sovereignty, unity and patriotism, the flag has no challenger. It is also recognized by nearly all parties and the courts below as an important symbol of the freedoms found in the Bill of Rights, including the right of free speech.[6] As viewed by the Association, the supporters of the statute now before the Court believe that there is a direct and unavoidable tension between

[5] *United States v. Haggerty*, No. 89-1434, Jurisdictional Statement ("J.S.") at App. 16a ("a symbol of freedom in this nation"); *United States v. Eichman*, No. 89-1433, J.S. at App. 17a ("this solemn symbol of our Nation's soul"); Brief for the United States at 34, 44, 45 ("the unique symbol of the Nation"), and at 36 ("the Nation's unique symbol of community"); Brief for the Speaker and Leadership Group of the U.S. House of Representatives, *Amici Curiae* ("House Brief") at 10, 39 (recognizing flag's "symbolic interest"); Brief of the United States Senate as *Amicus Curiae* in Support of Appellant ("Senate Brief") at 6 ("the nation's salient symbol").

[6] *See also* Senate Brief at 7 ("the emblem of freedom and equality") (quoting H.R. Rep. No. 2128, 51st Cong., 1st Sess. 1 (1890)), at 31 ("a special emblem of our principles and ideals, and of our Nation's struggle for freedom") (quoting remarks of Senator William S. Cohen, 135 Cong. Rec. S12582 (daily ed. Oct. 4, 1989)), and at 32 ("a potent symbol of the right of the people to petition peacefully for the redress of grievances"). The House Brief curiously ignores this aspect of the flag's symbolism.

these two symbolisms, of authority and patriotism against free speech and expression. The Association believes that the two can and must co-exist, and that settled First Amendment principles so establish.

That the United States flag is symbolic of the nation's sovereignty and military strength and all that those terms connote is not unique in the history of flags.[7] Millions thrill to the sight of the United States flag at parades and on other ceremonial occasions. No one can question the importance of the United States flag in the minds and hearts of our people. Moreover, we share the feelings of patriotic Americans who take great offense that some fortunate enough to live under this flag would resort to desecrating it to make a point. It is important for us to recognize, however, that as a symbol of sovereignty and patriotism, our flag, no matter that we feel strongly about it, is not unique.

Nonetheless, among flags of the world's nations, the United States flag *is* special in that, for both our citizens and many people beyond our Nation's borders, it symbolizes both national authority *and* individual freedoms.[8]

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[7] The universality of flags and their significance are described by George Henry Preble in his classic work *The Origin and History of the American Flag* (1917) at 3:

> Symbols and colors enabling nations to distinguish themselves from each other have from the most remote periods exercised a powerful influence upon mankind. Thus these symbols, which during peaceful times were but trivial ornaments, became in political or religious disturbances a lever like that of Archimedes, and convulsed the world.

[8] The report by the ABA Task Force on the First Amendment accompanying the proposed resolutions stated it thusly: "All through human history, tyrannies have tried to enforce obedience by prohibiting disrespect for the symbols of their power. The swastika is only one example of many in recent history. The American flag commands respect and love because of our country's adherence to its values and its promise of freedom, not because of fiat and criminal law." *Statutory and Constitutional Response to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 395, 403 (1989).

Although England has had a formal Bill of Rights since 1689[9], and the Union Jack is recognized around the World, the British flag would not have provided clear and distinct meaning if waved by those recently protesting governmental authority in Eastern Europe, the Baltic States or the streets of China's cities.[10] At its best, the United States flag has had this capacity for representing to the oppressed the concept of governmental authority associated with individual freedoms.[11]

This case requires the Court to reaffirm that national strength, unity and patriotism are compatible with the freedom to protest against such authority, even by destroying in a peaceful manner a preeminent symbol of that authority. Indeed, while such an expressive act is extremely offensive to most of us, it is the fact that we permit such protest that gives this Nation its strength. We submit that a treasured feature of the symbolism of

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[9] "An Act Declaring the Rights and Liberties of the Subject and Setting the Succession of the Crown." 3 Encyclopedia Britannica 577 (1952 ed.).

[10] *See* W. Smith, *The Flag Book of the United States* 87 (1970):

> If we are to reject false history [folklore of the United States flag], we can still find much in the true story of the flag that evokes the highest admiration. It has waved over the unparalleled progress of a nation in developing democratic political institutions, scientific and technological knowledge, education and culture, commerce and industry, and countless other advances. It has served as a beacon for millions of poor and oppressed refugees from abroad and stands as a promise that the underprivileged within the country are not forgotten. Its influence throughout the world is inestimable.

[11] While the flag of the United States is sometimes reviled in other parts of the world as a symbol of imperialism, yet in 1864 even Karl Marx wrote, concerning the Civil War, that "the working men of Europe felt instinctively that the star-spangled banner carried the destiny of their class." *The Flag of the United States, supra*, at 87.

the United States flag is that it represents both great authority and, as a part of the fabric of this spirit, great tolerance, even toward a citizen seeking to challenge that authority through the peaceful destruction of one of its best-known symbols. What we revere are the ideals which the flag symbolizes, not the object itself, for those ideals remain long after any particular flag has fallen to the ravages of time or the destructive hands of an enemy in war or a political dissenter at home.[12]

In hastening to adopt the Flag Protection Act of 1989 and in mandating accelerated consideration of any decision holding the Act unconstitutional,[13] the Congress has

[12] We cannot find in the discussion of the House Brief on "original intent," at 20-36, or the sources referred to there, any suggestion that James Madison (who himself was a leader in the crusade against the Sedition Act of 1798 and who thereby contributed enormously to banning the crime of seditious libel from American law) or other supporters of the Bill of Rights would have equated defending our ships of war and trade on the High Seas, and protecting against treason, with suppressing a peaceful protest involving abuse of a flag in an expression of dissent from governmental action. We also differ from the House Brief, at 30-32, in the significance attributed to the arrest and punishment of John Endecott of Massachusetts for defacing the British flag of that time. It should give no comfort to the supporters of the Flag Protection Act that the colonial courts, fearing retaliation by England, prosecuted, convicted and punished Endecott. What seems more significant is that ten years later Endecott was elected Governor of Massachusetts. It is difficult to conceive that this incident was viewed by the proponents of a Bill of Rights as an example of the type of conduct that needed to be criminalized. It seems more likely that James Madison, Thomas Paine and other supporters of the Bill of Rights would, like the people of Massachusetts, have honored Endecott rather than the fearful officials who prosecuted him to please the King.

Further, we have noted only recently the tolerance accorded protesters marching past the reviewing stand at Red Square in Moscow with the "Hammer and Sickle" cut out of the Soviet flag, an expression of dissent much like that of John Endecott.

[13] Section 3 of the Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (to be codified at 18 U.S.C. § 700(d)).

reflected a widely shared impatience by the people of the Nation towards those few citizens who have chosen to express their opposition to governmental policy, whether generalized or specific, by burning the flag. There is nothing surprising about this. The courts, however, provide a quieter, more philosophical and judicious atmosphere in which the ultimate values woven into our national flag can be identified, appraised, reconciled where seemingly in conflict, and preserved for the present and coming generations.

Although many instances may be cited in which the flag has been physically abused in political protests, we submit that no instance can be referred to where the ideas and ideals which the flag symbolizes were damaged by this abuse.[14] Indeed, the interest in preserving the flag's character as a symbol of nationhood or sovereignty is not, as a matter of fact, at all implicated when a flag is destroyed as part of a political protest. The symbol that is sought to be protected resides not in the flag, the piece of cloth that someone burns, but in the concepts associated with the flag. When someone symbolically burns a "flag," that person is *using* the symbolism of the flag, not destroying it. Instead of undermining the symbol's

[14] In the House Brief at 36 n.50, the question is raised as to how we can protest to a foreign Ambassador about abuse of the United States flag in that country's streets when the Ambassador can point to our tolerance of flag abuse in this country. We suggest that the United States' protest would not be made unless our representatives suspected that the abuse of the U.S. flag was stimulated by the other government. Certainly we would not want a government like that in Iran to mete out punishment considered appropriate by its standards to someone abusing a U.S. flag. What we should fear is that the decision sought by Appellant in this case could be pointed to as a precedent by another nation seeking to punish speech or expressive conduct offensive to the government, such as the publication of *The Satanic Verses* or the abuse of the American flag by students in Korea protesting our military presence there. Except for the severity of punishment, what is the difference?

representation of nationhood, the flag burning affirms and reinforces the declaration.

II. THE FLAG PROTECTION ACT OF 1989 MUST BE SUBJECTED TO THE STRICTEST SCRUTINY, BECAUSE THE INTERESTS PROMOTED BY THE ACT ARE ALL CLEARLY "RELATED TO THE SUPPRESSION OF SPEECH," AND THE INEVITABLE CONSEQUENCE OF THE ACT WILL BE TO RESTRICT POLITICAL PROTEST SOLELY IN THE INTEREST OF PROTECTING THE CONGRESSIONALLY PREFERRED SYMBOLISM.

A.

As set out in *United States v. O'Brien*, *supra*, 391 U.S. at 377, and reiterated last Term in *Texas v. Johnson*, *supra*, 109 S. Ct. at 2540-41, a statute that restricts expressive conduct is subject to the strictest judicial scrutiny unless it serves some governmental interest that is "unrelated to the suppression of free expression." *See also Boos v. Barry*, 485 U.S. 312, 321 (1988). The United States concedes that the appellees' flag burning constituted expressive conduct, and that the Flag Protection Act of 1989 encompasses within its prohibition such symbolic speech.[15] Accordingly, the central issue presented by these appeals is whether the justification for the restrictions imposed on appellees' conduct is unconnected to expression. We submit that whether the interest asserted to justify the Act is protecting the "physical integrity of the flag,"[16] the flag as "the unique symbol of the Nation,"[17] or the flag as an "incident of sovereignty,"[18] the interest promoted is clearly *not* "unrelated to the suppression of free expression." *O'Brien*, *supra*, 391 U.S. at 377 (emphasis in original).

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[15] Brief for the United States at 28.

[16] Senate Brief at 6, 27, 28, 33, 34; House Brief at 8, 20.

[17] Brief for the United States at 34, 44, 45.

[18] House Brief at 9, 20, 39.

B.

The arguments made in defense of the Flag Protection Act abound with euphemisms, the most prominent of which in this case is "protecting the physical integrity of the flag." Strips of vari-colored bunting when sewn together have a wholeness and in this sense a "physical integrity." What an owner quietly and peacefully does to an assemblage of vari-colored bunting could be of no concern to the Congress or anyone else unless this particular fabric, because of its arrangement of colors, is associated with a special meaning which the Congress wishes to protect and preserve.[19] It is the spirit of symbolism of this particular arrangement of bunting about which Congress is concerned. "Integrity" in this sense takes on a secondary meaning associated with morals and truth. (Webster's Third New International Dictionary (Unabridged) 1174 (1976).) Accordingly, a majority of the Court has never held, or suggested, that a statute limited to protecting "the physical integrity of the flag" would be unrelated to expression.[20]

The phrase "physical integrity of the flag" first appears in *Smith v. Goguen*, 415 U.S. 566, 580 (1974), where the Court held that Massachusetts' prohibition against treating the flag "contemptuously" was void for vagueness. In overturning Goguen's conviction under this provision for wearing a small cloth version of the flag sewn to the seat of his trousers, the Court found no sup-

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[19] In discussing the meaning of the flag, The Boy Scout Handbook refers to patriots from Washington to Martin Luther King, Jr. Boy Scouts of America, *The Official Boy Scout Handbook* 470 (1990). It is to be noted that Dr. King participated in a rally in New York City on April 15, 1967, in protest of the United States' action in Vietnam. The burning of the American flag was a part of the demonstration. N.Y. Times, April 16, 1967, at 1, col. 4.

[20] "A symbol by definition has no value apart from expressive value." *Measures to Protect the Physical Integrity of the American Flag: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. 231 (1989) (statement of Charles J. Cooper, Esq.).

port for the state's argument that the statute reached only acts that "actually impinge upon the physical integrity of the flag." *Id.* (quoting Brief for Appellant). Although Justice White did not agree that the contempt provision was unconstitutionally vague as applied to Goguen, he concurred in the judgment on the ground that the conviction was necessarily tied to the communication of distasteful ideas about the flag and thus violated the First Amendment. Justice Blackmun in dissent found that the Massachusetts courts had "limited the scope of the statute to protecting the physical integrity of the flag," *id.* at 591, and therefore, that the provision did not violate the First Amendment *as applied to Goguen's nonexpressive conduct.*[21] Justice Rehnquist went further in his dissent, finding "at least marginal elements of 'symbolic speech' in Goguen's conduct," *id.* at 593, but concluding that "the governmental interest [in preserving the physical integrity of the flag] is sufficient to outweigh whatever collateral suppression of expressive conduct was involved in the actions of Goguen." *Id.* at 600.

In another flag protection case that same Term, *Spence v. Washington*, 418 U.S. 405 (1974), the majority of the Court again did not recognize protection of the physical integrity of the flag as a non-speech related interest. The Court merely held that Spence's displaying of a flag out of his apartment window, upside down and affixed with a peace symbol fashioned of removable tape, did not "significantly impair[]" any interest the "State may have in preserving the physical integrity of a privately owned flag. . . ." *Id.* at 415. Moreover, in rejecting as speech-related the state's purported interest in preserving the flag as a symbol of the Nation, the Court noted that "no other governmental interest unrelated to expression has been advanced or can be supported on this record. . . ." *Id.* at 414 n.8.

[21] The record did not indicate "whether [Goguen] was attempting to communicate anything at all [by his conduct]," *id.* at 592 (Rehnquist, J., dissenting), and Justice Blackmun repeatedly emphasized the Massachusetts Supreme Court's finding that Goguen "was not punished for speech." *Id.* at 591.

Finally, in *Texas v. Johnson*, *supra*, 109 S. Ct. at 2543 & n.6, the Court noted that the Texas statute at issue was "not aimed at protecting the physical integrity of the flag in all circumstances," and cited the dissenting view of Justices Blackmun and Rehnquist in *Smith v. Goguen*, *supra*, that the statute at issue there had been so limited. Nowhere, however, did the Court suggest that if a flag protection statute *were* so limited, it could be constitutionally applied to prohibit expressive conduct. The Court's citation to Justice Blackmun's dissent in *Smith v. Goguen* does not support such an inference since, as noted above, Justice Blackmun's opinion in that case depended upon his conclusion that Goguen had *not* been prosecuted for expressive conduct.

These cases show that the Court has not failed to recognize that the so-called "physical integrity" interest is implicitly speech-related. The Court has also had no trouble in finding that an open attempt to preserve the symbolic value of the flag is necessarily and explicitly connected to the suppression of expression. In *Spence v. Washington*, *supra*, the Court found that the state's "interest in preserving the national flag as an unalloyed symbol of our country" is "directly related to expression in the context of activity like [Spence's]." 418 U.S. at 412, 414 n.8. Likewise, in *Texas v. Johnson*, *supra*, the Court found that "an interest in preserving the flag as a symbol of nationhood and national unity" was "related 'to the suppression of free expression' within the meaning of *O'Brien*." 109 S. Ct. at 2542. Such an interest in preserving the flag as "a symbol with a determinate range of meanings" cannot survive strict scrutiny. *Id.* at 2544.

C.

The Flag Protection Act of 1989 is nothing more than an effort to protect particular symbolic meanings of the flag. It is only when the flag is handled in certain ways that show disrespect that the Act comes into play. Proscribed by the Act are those things which political dissenters have often done, such as defacing, trampling upon, defiling or burning the flag, to dramatize ideas that clash with the ideas about the flag which Congress would approve. Congress has sought in the Act to preserve and protect the set of ideas that its members and most of our citizens associate with the flag by drafting a statute apparently "neutral on its face" which, despite the holding by this Court in *Texas v. Johnson*, *supra*, Congress thought would withstand constitutional attack against criminalization of the abuse of flags in political protests.

This was an ill-conceived effort, as was made clear by the Government's own legal advisor in his written submission to the House of Representatives in connection with its consideration of flag protection legislation:

> It has been argued that the Court would uphold a statute if it prohibited *all* Flag desecration, whether in public or private, and whether done with contempt or not. This argument is demonstrably wrong because it assumes that the Government's reason for enacting a facially neutral prohibition (that is, a statute neutral as to the *particular* viewpoint expressed) would be "unrelated to expression." It would not be. The Government's reason for passing a viewpoint-neutral prohibition would be the same as its reason for passing a prohibition on contemptuous desecration only: protection of the symbolic value of the Flag. The Supreme Court has held in two successive cases, *Spence v. Washington* and *Texas v. Johnson*, that it is the Government's *reason* for the prohibition, not the scope of the prohibition, that determines the level of scrutiny. Because the Government's reason for protecting the Flag is necessarily related to expression, the prohibition would always be subjected to exacting scrutiny, and therefore would never prevail over an individual's First Amendment interest in expressive conduct.[22]

Certainly, a content neutral statute *may* be constitutional, *if* it serves "an important and substantial interest" *and* its impingement on free speech is only incidental, *United States v. O'Brien*, *supra*, 391 U.S. at 377; or if it is applied only to nonexpressive conduct. *Smith v. Goguen*, *supra*, 415 U.S. at 590-91 (Blackmun, J., dissenting). If, however, the interest sought to be promoted by the legislation is directly related to the suppression of expression, and its principal impact will be on expressive conduct that is protected by the First Amendment, then it does not matter that the statute applies to nonexpressive conduct as well.

The communicative elements of the United States flag are so dominant that the restrictions placed by the Flag Protection Act on physical abuse of the flag are necessarily restrictions on expression. The United States flag speaks eloquently, but a disrespectful response by a dissenting citizen would be muted by the Act, which compels a person to act, if at all, in a way that endorses the majority view of the flag. For one who disagrees with the majority view, this amounts to a compulsion "to utter what is not in his mind," *Board of Education v. Barnette*, *supra*, 391 U.S. at 634, or else to remain silent. Thus, it is the inevitable consequence of the Act that the principal offenders to be prosecuted, perhaps the sole offenders, will be political dissenters similar to the defendants in the cases before the Court. This is inherent in

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[22] *Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 179-80 (1989) (emphasis in original) (statement of William P. Barr, Assistant Attorney General, Office of Legal Counsel).

the statute itself and, as discussed below, is shown by the Act's legislative history to have been the sole purpose and intent of the Congress.

D.

An examination of the legislative history of the Flag Protection Act of 1989 confirms that the inevitable consequences of the Act are fully consistent with the purpose and intent of Congress in enacting the legislation. Criminalization of nonexpressive abuse of the flag was, at most, only peripheral and incidental to Congress' principal aim to punish protestors who offend others by dramatic abuse of the flag in order to attract attention to the political views they expound.

It was openly and repeatedly stated by Members of Congress and reflected in the Congressional committee reports that the purpose and motivation for the Act was to design a statute which would avoid the rule of *Texas v. Johnson*, the result of which would be to permit the prosecution of those who abuse the flag in expressing political dissent. No other motivating cause can be found in the Act's voluminous legislative history. Certainly the avoidance of the rule of *Texas v. Johnson* would not have been necessary to reach nonexpressive flag abuse. Nowhere in the Committee reports, the statements on the floors of the House and Senate, or the oral and written statements of members of the Congress and others presented at the Committee Hearings, have we found any anecdotal or empirical evidence of actual nonexpressive flag abuse. Of course, one might give hypothetical examples of such abuse, as when a careless or insensitive person allows a flag to drag on the ground or uses a flag to wash a car, but this hardly justifies criminalization or explains the great emotion shown over the present statute or the high priority attributed to it by the Congress.

Thus, the sole objective of the legislation was to permit the prosecution of those who were shielded by *Texas v. Johnson* in their abuse of the American flag as an expression of political protest or dissent. Congress adopted the approach of broadening the coverage of the statute in order to validate the same kind of prosecutions which it assumed could not be upheld under the 1968 flag protection act. The entire exercise was to change some words in a way that signified nothing of real significance in an attempt to get around the First Amendment barrier identified by the Court in *Texas v. Johnson*.

Reason and experience tell us that punishment of political dissenters would be the dominant function of the Act if it were upheld, and that application of the Act to nonpolitical abuses of the flag arising from carelessness or insensitivity would be not only incidental but almost nonexistent. As clearly confirmed by the legislative history, punishment of nonexpressive abuse was not an interest that Congress sought to promote, and its authorization of such punishment served the sole function of providing a device for the argument that the Act, because of its extension to nonexpressive abuse, became "neutral on its face" and beyond constitutional challenge. We submit that for the Court to accept such a subterfuge would make a mockery of reason and experience, create a dangerous precedent for restriction of the Bill of Rights, and seriously weaken the guarantees of the First Amendment.

III. THE RECOGNIZED AUTHORITY OF THE CONGRESS TO MAKE LEGISLATIVE FINDINGS AND SET GOVERNMENTAL POLICY DOES NOT DIMINISH THE CONSTITUTIONAL ROLE OF THE FEDERAL JUDICIARY TO UPHOLD FIRST AMENDMENT RIGHTS.

The United States is commendably candid in acknowledging that its position is "in tension" with *Texas v. Johnson*, *supra*, and urges the Court to reconsider and appropriately limit *Johnson*. The United States argues that the Court should defer to the "*Congressional* determination regarding the need to protect the physical integrity of the American flag that led to enactment of the

Flag Protection Act." [23] Such deference, however, would entrust to Congress the value balancing that the courts have traditionally performed in exercising strict scrutiny in First Amendment cases. This argument, therefore, deserves special comment because, in the Association's view, it threatens the institutional role of the federal judiciary and, indeed, the presuppositions of *Marbury v. Madison*, 5 U.S. 137 (1803), itself.

The United States recognizes that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." [24] The decision of this Court from which this language is taken involved a state legislature's express finding "that a clear and present danger to the orderly administration of justice would be created by divulgence of the confidential proceedings" of a Judicial Inquiry Commission. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). The Court responded as follows:

> A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. *Were it otherwise, the scope of the freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.*

Id. at 844 (emphasis added).

The United States' argument in these appeals for this Court's deference to Congressional value judgments regarding flag burning risks precisely the kind of nullification of the function of the First Amendment and the

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[23] Brief for the United States at 42 (emphasis in original).

[24] Brief for the United States at 26 (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)).

role of the judiciary that this Court rejected in *Landmark*. The United States supports its argument for such a radical restructuring of our constitutional safeguards by quoting a passage from *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981), suggesting that the "customary deference accorded the judgments of Congress" is particularly "appropriate when . . . Congress specifically considered the question of the Act's constitutionality." [25] However, when *Rostker* and *Landmark* are read appropriately in the context of the two cases and in light of the very different concerns being addressed by the legislature in each case, it becomes clear that *Rostker* in no way undermined or limited *Landmark*.

At stake in *Rostker* was whether the Congressional decision to limit registration under the Military Selective Service Act to males constituted sex discrimination. The Congressional judgment to which then Justice Rehnquist urged deference was the determination, after hearing extensive testimony, that the possibility of using 80,000 females in noncombat positions did not make it worthwhile to incur the added burdens of including women in draft registration plans. The Congressional determination to which deference was given in *Rostker*, therefore, was a determination of primary facts as to which Congress' fact-gathering capacities uniquely extended. It was *not* a Congressional effort to gauge the weight of allegedly compelling interests or the seriousness of possible First Amendment infringements and to weigh these in the strict scrutiny balance—a task that in our constitutional system has always been a function of the judiciary. In short, deference to legislative assessments of constitutional values is the very legislative role rejected by the Court in *Landmark*, and the asserted Congressional weighing of competing values for which the United States seeks deference in this case fits the value-

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[25] Brief for the United States at 26-27.

balancing *Landmark* model, not the very different, primarily fact-assessing model of *Rostker*.

To hold that the Flag Protection Act of 1989 can pass the strictest scrutiny because it is justified by an interest in protecting government policies and dominant values, as determined and weighed by Congress itself, would be tantamount to reintroducing the seditious libel concept into American law. One of the deepest strands in our First Amendment law is the impermissibility of that crime under our Constitution. That is the lesson the Court drew from the controversy over the Sedition Act of 1798, which, according to the Court, "first crystallized a national awareness of the central meaning of the First Amendment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964). The *New York Times* case is as important as it is precisely because it makes clear that "seditious libel"—criticism of government and dominant values—is protected by the First Amendment.[26] To uphold now a ban on flag burning because of the Congressionally perceived interest in protecting the government's or the majority's values against dissenting voices, *i.e.*, to equate the flag with an essentially partisan view of the values with which it is to be identified, risks an intolerable erosion of our freedoms.

IV. INVALIDATION OF THE ACT AS APPLIED TO EXPRESSIVE POLITICAL DISSENT IS COMPELLED BY A LOGICAL PROJECTION OF PRIOR DECISION OF THE COURT.

Over the past twenty-one years the Court has accepted jurisdiction and acted upon four flag abuse cases—*Texas v. Johnson*, *supra*; *Spence v. Washington*, *supra*; *Smith v. Goguen*, *supra*; and *Street v. New York*, 394 U.S. 576 (1969). We submit that the developing doctrine set forth in these cases, in *Board of Education v. Barnette*, *supra*,

[26] *See* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191.

in *United States v. O'Brien*, *supra*, and in other related decisions of the Court[27] requires an affirmative answer to the question now directly at issue: Is an act of Congress that on its face identifies and criminalizes familiar forms of expressive flag abuse, without reference to the public nature of the event, the motives of the accused or the reaction of others, unconstitutional when applied to peaceful expressive conduct undertaken publicly by a political protester. For the first time, the Court is squarely faced by a flag protection act of the United States which is presented by its defenders as being "content neutral" but which reason and experience, supported by an ample legislative history, demonstrate will have the inevitable consequence of punishing political dissenters, like the appellees in the cases before the Court, who abuse the flag to dramatize their opinions and beliefs.

In the earliest of the Court's four flag abuse cases, *Street v. New York*, *supra*, Street was convicted of violating the New York flag abuse statute by burning an American flag and shouting to a small crowd, "We don't need no damn flag," and "If they let that happen to Meredith [civil rights leader James Meredith reported in the news as having been shot in Mississippi] we don't need an American flag." 394 U.S. at 579. The Court invali-

[27] The increasing awareness over past decades of the seriousness of the First Amendment issues involved in these flag abuse cases is well-illustrated by the contrast between the Association's action in 1989 shown in the Appendix and its earlier action in 1918, reported in the Senate Brief at 15, where the Association approved a "Uniform Law for the Protection of the Flag of the United States." That law would have criminalized not only stated forms of physical misuse of a flag, done publicly, but also casting contempt "by word or act" upon any "flag, standard, color, ensign, or shield" of the United States or of the state, or any copy, picture or representation of such. Report of the Forty-First Annual Meeting the American Bar Association at 82 (1918). The Uniform Act would clearly have failed the test of *Texas v. Johnson*.

dated the conviction on constitutional grounds since it could not be determined from the record that Street had not been convicted because of words alone or because of words and deeds. *Id.* at 590. The Court concluded that in either event the accused's rights of free speech were violated. *Id.* at 590-94. The Court expressly reserved its view on the validity of a conviction based solely upon burning of the flag conducted as an act of protest, *id.* at 594, but Justice Harlan's opinion for the Court strongly suggested that an interest in the symbolic value of the flag could not justify convicting political protesters for burning the flag:

> We have no doubt that the constitutionally guaranteed "freedom to be intellectually . . . diverse or even contrary," and the "right to differ as to things that touch the heart of the existing order," encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous.

394 U.S. at 593 (quoting *Board of Education v. Barnette*, *supra*, at 642).

The next of this Court's flag cases was *Smith v. Goguen*, *supra*, where the Court in reviewing a Massachusetts flag misuse statute held it unconstitutional under the Due Process Clause of the Fourteenth Amendment because the critical statutory term "treats contemptuously" was unduly vague.[28] Although the Court may have assumed that a legislature could define "with substantial specificity what constitutes forbidden treatment of United States flags," it carefully refrained from saying what language would be required or whether such a statute would violate First Amendment rights when applied to expressive conduct. 415 U.S. at 581-83. Justice White concurred in the result on the grounds that the words "treats contemptuously" connoted a communicative element and since Goguen's conduct was clearly expressive of contempt for the United States, the statute violated the First and Fourteenth Amendments as applied to him. *Id.* at 583-90. Justice Blackmun was joined by Chief Justice Burger in a brief dissent. They would have accepted the conclusion of the Supreme Judicial Court of Massachusetts "that Goguen 'was not prosecuted for being "intellectually . . . diverse" or for "speech."'" *Id.* at 590-91 (quoting *Street v. New York*, *supra*, 394 U.S. at 593-94). Thus, Justice Blackmun would uphold a flag misuse statute "neutral on its face," as the state court in effect held the Massachusetts statute to be, where it was applied to nonexpressive conduct, as the state court found to be the case. Under this analysis, the rights of free speech and expression under the First and Fourteenth Amendments were not implicated in *Goguen*. This, of course, contrasts with our present facts, where expressive conduct is admittedly involved.

[28] *See* discussion in Section II.B., *supra*.

The facts and issues before the Court in *Spence v. Washington*, *supra*, come very close to those of the present case. There, a college student attached a large peace symbol to the front and back of a privately-owned United States flag and hung it upside down from his apartment window in Seattle, Washington. He was arrested and charged with violation of a state statute which forbade the exhibition of a United States flag to which is attached or superimposed figures, symbols or other extraneous material. This so-called improper use statute was "neutral on its face" in that it required no particular intent on the part of the violator or any reaction on the part of any viewer, though it did contemplate that the placements on the flag be for "exhibition or display." 418 U.S. at 407. The actions of the student concededly constituted a form of communication and expression. The majority opinion recognized the neutrality of the Washington statute on its face, saying:

> The statute's application is quite mechanical, particularly when implemented with jury instructions like the ones given in this case. The law in Washington, simply put, is that nothing may be affixed to or superimposed on a United States flag or a representation thereof.

Id. at 414 n.9. Nevertheless, despite this apparent neutrality, the Court concluded that the statute was "unconstitutional as applied to appellant's activity." *Id.* at 414.

In evaluating the significance in *Spence* and in the present cases of the state's asserted interest in preserving the national flag as an "unalloyed symbol of our country," *Spence*, *supra*, *id.* at 412, it is difficult to draw a meaningful distinction between a prohibition against destruction of a flag by burning and defacement of a flag by attaching to it removable "words, figures, marks, pictures, designs" and the like. Thus, that case and the cases presently before the Court seem inseparable on the basic issue before the Court.

In *Texas v. Johnson*, *supra*, the last in the series of the Court's four flag decisions, the Court recognized that "messages conveyed without use of the flag are not 'just as forcefu[l]' as those conveyed with it." 109 S. Ct. at 2546 n.11 (quoting dissenting opinion of Rehnquist, C.J., *id.* at 2553). To permit the flag to be used in ways that express the majority's respect and admiration, approaching reverence for many, but to deny to the minority the use of a flag in a way that expresses dissent, "assumes that there is only one proper view of the flag." *Id.* at 2544 n.9. It would permit the flag to express ideas "only in one direction." *Id.* at 2546. In noting that toleration of expressive flag abuse is evidence of our nation's strength, Justice Brennan referred to the memorable words of Justice Brandeis written sixty-three years ago:

> To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

Id. at 2547 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

Controlling in the present cases are the principles reflected in the Court's response to Texas' argument that Johnson's conviction under state law was justified by the State's "interest in preserving the flag as a symbol of nationhood and national unity." 109 S. Ct. at 2542. The Court noted that "[a]s in *Spence*, '[w]e are confronted with a case of prosecution of an idea through activity,'" 109 S. Ct. at 2542, and concluded that the "State's asserted interest in preserving the special symbolic character of the flag" should be subjected to "the most exacting scrutiny." *Id.* at 2543. The Court's observation that "the special role played by our flag" would not be endangered by the decision forbidding the prosecution is as fully applicable here as it was there. *Id.* at 2547. The Court added: "Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength." *Id.*

Despite some divergence of views in the opinions, concurring opinions and dissenting opinions in the foregoing flag abuse cases before this Court, and in *O'Brien*, we believe that a commonality of views can be reached with the recognition of two important factors, which *by now*

are evident, namely, (1) based on reason and experience the inevitable consequence and effect of a flag abuse statute of this sort is that, if upheld, it would serve almost entirely as a punishment for expressive conduct by political protesters, which the legislative history confirms was the purpose of Congress; and (2) the position of the United States flag as a symbol of both national unity and sovereignty, on the one hand, and individual freedom on the other, is in no way threatened but indeed is strengthened by tolerating the kind of political expression at issue here. The history of flags and, in particular, of the United States flag as referred to in the briefs of the parties and the *amici curiae* show the tremendous emotional impact a nation's flag can have through the centuries. This presents the kind of atmosphere in which the Court needs to be diligent and courageous in protecting First Amendment rights.

We submit, moreover, that this is an appropriate occasion for application of *stare decisis*. The developing philosophy of the Court with respect to First Amendment principles encountered in attempts to punish abuse of the flag came to fulfillment in *Texas v. Johnson*. In an alternative argument in the present case, the Solicitor General recognizes that a reversal of the decisions below would require this Court to overrule *Johnson*.[29] This reflects the position taken in 1989 by the Department of Justice in William P. Barr's statement to the House Subcommittee.[30] For the reasons given by Justice Lewis F. Powell in a recent address,[31] it would be timely for the

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[29] Brief for the United States at 42-45.

[30] *See supra* note 22 and accompanying text.

[31] The "specific merits" of *stare decisis* commented on by Justice Powell were: (1) it eases the work of the judges; (2) it enhances stability in the law; and (3) "perhaps" as the "most important and familiar," it enhances respect for the Court and provides it

Court to put to rest the present issue and announce with as near unanimity as possible that rights of free speech and expression are being exercised in the public marketplace of competing ideas when a flag is abused in an expression of political dissent.

With a demand for democracy being made by peoples throughout the world, and the common standard being the freedoms, not the power or authority, associated with the United States flag, now would seem the ideal time for the Court to demonstrate the significance and practical application of the First Amendment guarantee of freedom of speech. Conversely, if the decision went the other way, it would be sad to contemplate the precedent which oppressive governments could seize upon to stifle political expression under the guise of "neutral" restrictions. It must be assumed that this precedent will be carefully noted by friends of democracy and supporters of dictatorship throughout the world.

CONCLUSION

The Court over the past 21 years has considered four flag abuse cases and on various grounds rejected the accusations under all of them. We respectfully submit that there now is a great public need for a statement in terms that will be clear and unmistakable that, even though the general regard for the flag of the United States may approach reverence, its uniqueness among the flags of all nations, now and in history, is that it is a symbol of freedom for us and millions around the world. The cornerstone of that freedom is that we are strong enough and confident enough to tolerate differences, even to the extent of abuse of a flag as an expression of political dissent. The physical symbol of that freedom

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with "public legitimacy." Association of the Bar of the City of New York, 44 *The Record* 813, 818-819 (Dec. 1989).

should not be held more sacred than the freedom it represents.

Respectfully submitted,

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May 3, 1990

APPENDIX

APPENDIX

American Bar Association Letter and Resolutions [1]

ABA
[ABA LOGO]
AMERICAN BAR ASSOCIATION
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

CHAIRMAN HOUSE OF DELEGATES
George E. Bushnell, Jr.
150 West Jefferson
Suite 2500
Detroit, MI 48226

August 21, 1989

The Honorable Don Edwards
Chairman
Subcommittee on Civil and
Constituted Rights
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I write to advise you that at its recent meeting in Honolulu, the American Bar Association's House of Delegates, "in the interest of preserving intact the right of freedom of speech and expression under the First Amendment," overwhelmingly adopted a resolution opposing any amendment to the U.S. Constitution or enactment

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[1] These appear in *Statutory and Constitutional Response to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 393-95 (1989).

of federal legislation concerning desecration of the American flag. The resolution further "deplores any descration of the flag and declares its full support for the proposition that the flag is a revered national symbol that ought to be treated with great respect by all citizens of the United States of America."

The House of Delegates adopted its policy based on the unanimous report of a special task force I had appointed to examine the numerous proposals stemming from the Supreme Court decision in *Texas v. Johnson* and to recommend ABA policy positions on these proposals. The task force was chaired by former Commissioner of the Internal Revenue Service Randolph Thrower. Its members were Columbia University Law School Dean Barbara Black; former Deputy Secretary of State Warren Christopher; former Harvard Law School Dean and Solicitor General of the United States Erwin Griswold; Stanford University Law School Professor Gerald Gunther; former New York University Law School Dean Robert McKay; former U.S. Attorney Earl Silbert; and former Secretary of State Cyrus Vance.

I am sending along to you both the adopted resolution and the report of the task force which I respectfully request be made part of the hearing record on this issue.

We of the American Bar would be pleased to provide you with any additional information you might require, or to meet with you at your convenience so that we can respond to any concerns that you might have.

Should you have any questions please contact Robert Evans, Director of our Governmental Affairs Office in Washington, D.C., at 331-2214.

Sincerely,

/s/ George E. Bushnell, Jr.
GEORGE E. BUSHNELL, JR.
Chairman, House of Delegates

Adopted by voice vote
August 1989

Be it resolved, that the American Bar Association, in the interest of preserving intact the right to freedom of speech and expression under the First Amendment of the United States Constitution, opposes the adoption of an amendment to the Constitution concerning the desecration of the American flag.

Be it further resolved, that the American Bar Association opposes the enactment of federal legislation that would seek to criminalize the desecration of the American flag as a political protest.

Be it further resolved, that the American Bar Association deplores any desecration of the flag and declares its full support for the proposition that the flag is a revered national symbol that ought to be treated with great respect by all citizens of the United States of America.